The Czech Constitutional Court, the Unconstitutionality of the Electoral Legislation, and the Possible Constitutional Deadlock*

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Title: La Corte Costituzionale della Repubblica Ceca, la incostituzionalità della legge elettorale, e la possibilità di stallo del sistema istituzionale

Keywords: judicial review, electoral legislation, constitutional continuity.

1. – On 2 February 2021, the Constitutional Court of the Czech Republic (hereinafter referred to as "the Court" or "the Constitutional Court") delivered a decision Pl. ÚS 44/17 that repealed several sections of Act No. 247/1995 Sb., Parliamentary Elections Act with immediate effect, leaving the country without any applicable electoral legislation eight months before the Chamber of Deputies election.

This judgement is an earth-shattering one within the Czech constitutional system as it completely overturns almost 30 years of *jurisprudence constante* of the Constitutional Court's review of electoral legislation. However, it is also of great value from the point of view of comparative constitutional law as it diverges from the Constitutional Court's long-standing practice of guarding the continuity of the constitutional system and restraining themselves when reviewing electoral legislation close to the elections.

In 2017, a group of senators asked the Court to repeal substantial parts of the Parliamentary Elections Act regulating electoral threshold, electoral regions, and the seat allocation and distribution method—in all cases concerning elections to the Chamber of Deputies. The petitioners considered the regulation as not upholding the principles of proportional representation as required by Art. 18 (1) of Act No. 1/1993 Sb. of the

* The article was supported by the Charles University, project GA UK No. 462120 and SVV project no. 260 494 "Integrative Function of the Human Rights in the Modern Law".

DPCE online
ISSN: 2037-6677

Constitution of the Czech Republic (hereinafter referred to as "the Constitution"), and, therefore, as unconstitutional.

In this article, we shall examine the crucial parts of the above-mentioned judgement and their implications, taking into account the outside-of-the-Czech-Republic perspective. At first, we shall focus on the procedural grounds the Court had to deal with in order to proceed with a full hearing (par. 2), then on the different meritorious aspects of the case, namely, the principles of proportional representation (par. 3), electoral regions (par. 4), the electoral threshold (par. 5), and the seat allocation method (par. 6). Once we consider all the meritorious particularities of the judgement, we shall discuss the possible consequences of the judgement for the Czech constitutional system and their importance for comparative constitutional law (par. 7 and 8). Most of all, we shall focus on the various ways to deal with the problem of how close to the next election it is still possible to pass a judgement repealing (part of) the electoral legislation without hindering the upcoming electoral process and its outcome (par. 9), and the problem of how to ensure the continuity and stability of the constitutional system and its institutions is not endangered by the repeal of the electoral legislation (par. 10). We shall present three possible ways to successfully deal with these problems based on the judgements of the U.S. Supreme Court, the German Federal Constitutional Court, and the Italian Constitutional Court. Then, we shall confront the present judgement of the Czech Constitutional Court and examine its possible negative impacts on the Czech constitutional system.

Before we commence with the case itself, we should briefly introduce the Czech Republic's constitutional system, which constitutes the framework within which the present judgement has been made, as well as the electoral system the case is all about.

Czechia is a parliamentary republic with a bicameral parliament, constituted by the Chamber of Deputies and the Senate. The government is responsible solely to the Chamber of Deputies, and it is also this lower chamber of Parliament that can overrule the Senate when new legislation is being passed. Only in a few exceptions are both chambers equal. One such situation is when electoral legislation is being passed: both chambers need to pass the legislation, and the Chamber of Deputies cannot overrule the Senate. Another distinct feature of Czech parliamentarism is that each chamber is elected using a different electoral system to ensure that the political representation within those chambers does not simply mirror each other. Having different electoral systems for each chamber ensures that the upper chamber is able to serve as an effective check on the lower chamber when the legislation has to be passed by both chambers. For reasons of tradition, the Chamber of Deputies is elected using the proportional system and the Senate the majoritarian one. As the Court reviewed the electoral

system for the Chamber of Deputies in its most recent judgement, we shall look into it in more detail now.

The Constitution requires only that the two hundred members of the Chamber of Deputies be elected following the principles of a proportional representation (*Art. 18 (1) of the Constitution*). This means that the electoral system itself is regulated on the statutory level by the Parliamentary Elections Act.

The Chamber of Deputies is elected every four years in a general election using the party-list proportional representation system. The voting itself, and the allocation of seats to political parties, is conducted within 14 electoral regions, which are territorially the same as the local government regions and, consequently, differ in number of inhabitants from 294,644 to 1,385,141. However, the number of seats allocated to each electoral region is not fixed. The seats are distributed in every election proportionally to the number of votes cast in each electoral region. Therefore, the number of seats that each electoral region gets fluctuates from 5 (Karlovy Vary region) to 26 (Central Bohemia region). For a political party to be entitled to any seat in the Chamber of Deputies, it has to exceed the national electoral threshold—5% for a single party, 10% for a two-member coalition, 15% for a three-member coalition, and 20% for a four (or more)-member coalition. All the seats are allocated within one *scrutinium* (round of seat allocation) using the D'Hondt method.

Now we shall look into the present case.

2. – To proceed in a full hearing, the Court must always consider several procedural grounds of the submitted petition. Among these grounds, two are of great importance and interest to us—first, whether the matter is not a *res iudicata*, and second, whether the challenges of the legislation are well-founded.

The doctrine of *res iudicata* is well-established within the adjudication tradition of the Constitutional Court. However, as there is no doubt as to its applicability in the concrete (incidental) review of the constitutionality of a statute, it is not clear whether the doctrine is applicable also in an abstract review, i.e., when the Court reviews the constitutionality of a statute without any reference to a specific case. However, the reasons for its application in the abstract review are the same as in the concrete one—strengthening the legal certainty within society and stabilisation of the constitutional system, and last but not least, preventing the overburdening of the Constitutional Court with repetitive petitions.

The Court decided not to waive the applicability of *res iudicata* in the abstract review and instead to reason why it could not be applied in the present claims. The Court ruled that the question of the unconstitutionality of the challenged aspects of the Parliamentary Elections Act had not been determined in the past, and therefore, there is

no claim preclusion that would prevent the Court from hearing the case. The Court admitted it had examined the constitutionality of some of the aspects challenged by the petitioners, but it also stressed that such examination was done under different settings of the proportional electoral system. Therefore, the Court ruled that the case cannot be considered a *res iudicata*. Moreover, the Court decided that all of its judgements and its reasoning concerning the Chamber of Deputies' electoral system made before the enactment of the present electoral legislation, i.e., before the enactment of Act No. 37/2002 Sb. amending the Parliamentary Elections Act, cannot be fully taken into account as their relevance is weakened by the differences between the present electoral legislation and the electoral legislation applicable when the past judgements were made.

The dissenting judges, not arguing with the differences between the last electoral legislation and the present one, pointed out that the core of the Court's reasoning in the past is more than applicable in the present case too, as it is independent from the statutory regulation. Consequently, the dissenting judges argued that the Court failed to explain why it did not consider its previous reasoning, which was based on the constitutional law level and not on the statutory one. Moreover, the Court decided to ignore its previous decisions concerning the reviewed Parliamentary Elections Act (especially II. ÚS 582/06, Pl. ÚS 57/06) on the purely formalistic basis that those decisions were preliminary rulings and not judgements, even though the Court provided in these rulings a thorough reasoning of the constitutionality of some of the presently reviewed aspects of the electoral system.

To further elaborate the dissenting judges' point, we should take a look at the Court's ruling Pl. ÚS 42/17. The petition commencing this case was filed only five days before the petition of our present case. Even though the case Pl. ÚS 42/17 was rejected on procedural grounds in April 2018, it is worth looking into the reasoning of the Court, where we find that the Court confirms its long-term *jurisprudence constante* and expressly declares the electoral legislation constitutional. It is hard to understand how the same regulation could change from being confirm with the constitution to being unconstitutional in just three years without having been amended in any way and without any election providing new data having been held.

Another procedural ground we shall examine here is whether or not the petition was well-founded. For a petition for an annulment of the legislation to be heard, the petitioners must prove their claims to be well-founded. Otherwise, the Court has to reject such petition on the grounds of manifest unfoundedness (sec. 43 (2) a) of the Act No. 183/1993 Sb., regulating the Constitutional Court).

In this case, six of the nine claims lacked any reasoning at all and, according to the Court, should have been rejected on the above-mentioned

grounds. However, the Court decided to make an exception since it considered it necessary to examine all the challenged sections of the Parliamentary Elections Act together because they were all intertwined (Pl. ÚS 44/17: 122), although it later struck down some provisions while upholding the others.

The main issue with considering unfounded claims is that the Court is then essentially filling in for the petitioners, and inevitably must come up with the grounds on which the claims might be considered unconstitutional. Otherwise, the Court could not examine the constitutionality of the challenged provisions because there would not be any reasoning to examine. The obvious risk of such an approach is that the Court might adopt any grounds at all without being bound by the petition.

3. – The Chamber of Deputies is elected following the principles of proportional representation (Art. 18 (1) of the Constitution). It would therefore be impossible to decide the present case without first resolving the question of what the principles of proportional representation are. Consequently, the reasoning concerning those principles should have constituted the core of both the petition and the judgement, but it did not.

The Court decided to quote some of its previous decisions (Pl. ÚS 42/2000, II. ÚS 582/06) and reread them in light of other historical Constitutions—namely the constitutional texts of the Weimar Republic (1919), Austria (1920), Poland (1921), and the First Czechoslovak Republic (1920)—with the last one being previously deemed irrelevant in electoral matters by the Court itself (Pl. ÚS 25/96). Consequently, the bulk of the Court's reasoning concerning the principles of proportional representation was irrelevant as it was based upon the understanding of the principles by other constitutional systems with different historical experiences.

Let us focus therefore on the Court's reasoning considering the Czech constitutional system and the Court's jurisprudence constante. The Court maintained an opinion from its previous judgement Pl. ÚS 42/2000 according to which the core reason for having the principles of the proportional representation in the Constitution lies in distinguishing the electoral system of the Chamber of Deputies from the one used for the election of the Senate. Thus, those principles are not self-serving, nor do they promote any particular proportional electoral system variation. Their sole reason is to ensure the allocation of seats in the Chamber of Deputies is proportional to the number of votes the political parties received in the elections. Furthermore, the Court cited its previous judgement Pl. ÚS 42/2000 to substantiate the argument that it is necessary to review all the aspects together, as the mere fact that some of the aspects tend to be more majoritarian does not mean the electoral system as a whole does not uphold the principles of proportional representation. The Court then enhanced this so-called argument of complexity by concluding that to be

DPCE online
ISSN: 2037-6677

able to examine whether the challenged aspects of the Parliamentary Elections Act uphold the above-mentioned principles, it is necessary to choose one "firm spot" on which to stand and from which it is then possible to examine the others (Pl. ÚS 44/17: 117).

The idea behind the "firm spot" is that it is impossible to examine whether the whole matrix of the electoral system upholds the principles of proportional representation precisely because of its complexity and intertwines. In other words, in the Court's understanding, the electoral system is more than just the sum of its parts. And thus, if we decide to examine it aspect by aspect, we ignore the inter-influences between the particular aspects. However, at the same time, if we take into account the inter-influences of the particular aspects of the electoral system, we have to choose one of those aspects so we can measure the rest, as all of them are relative to each other. To better explain the Court's idea of the "firm spot", we can borrow the term frame of reference from physics. Imagine you are travelling by train and have decided to read a book to pass the time. From your point of view, the book is not moving except when you turn the page. However, from the point of view of a person standing on the platform when the train passes, the book is moving at the speed of the train. Therefore, the book's velocity depends on the observer and her frame of reference. In other words, for you on the train, the "firm spot" is the carriage. For the person on the platform, it is the surface of the earth. The Court thought in the same way and tried to find its "firm spot" for examining the nature of the electoral system of the Chamber of Deputies.

The Court has chosen the electoral regions as its "firm spot" to examine other aspects of the electoral system. Using this frame of reference, the Constitutional Court ruled that the electoral system does not uphold the principles of proportional representation. The Court explained its choice of the electoral regions as the "firm spot" by simply stating that these tend to be the least majoritarian from all of the challenged aspects. No further reasoning was provided. However, if we accept the premise that the electoral system can only be judged as a whole, we must conclude that the "firm spot" cannot be within the electoral system. When the Court chose the electoral regions, it put itself on the train trying to judge the train's speed by looking at the book in its hands. In our view, the only possible "firm spot" here is the Constitution.

Nevertheless, the premise of the impossibility of judging the particular aspects of the electoral system on their own is more than problematic. When we say the premise is problematic, we are not implying that we should ignore the outcome of the electoral system as a whole, i.e., the results of the election. Quite the contrary, we mean to say that it is necessary to thoroughly analyse the election results as a consequence of the electoral system as a whole, and, at the same time, we have to consider the particularities of the electoral system on their own. Precisely as the

Constitutional Court had been doing for almost 30 years before its present judgement in which it rejected the possibility of examining the particularities on their own while not analysing the results of the elections at all.

The dissenting judges, very similarly to what we have just concluded, maintained the Court's opinion of the jurisprudence constante and mentioned the previous judgement in which the Court stated that for the decision as to whether or not the electoral system upholds the principles of proportional representation it is essential to consider whether the results of the elections incline to the majoritarian rather than to the proportional system (Pl. ÚS 42/2000). The dissenting judges also stressed that there is a previous judgement in which the Court considered the currently reviewed electoral legislation as constitutional (II. ÚS 582/06).

The long-standing jurisprudence constante of the Constitutional Court maintained that the proportionality of the electoral system has to be understood as a balance between the integrative aspect and the aspect of differentiation. The former ensures the Chamber of Deputies can fulfil its constitutional duties, while the latter provides representation within the Chamber of Deputies to all groups according to their numeric relevance.

Even though definitional to majoritarian systems, the integrative aspect is a core feature of any electoral system, as the ultimate goal of any election to a representative body is to constitute an effective institution capable of fulfilling its duties. Consequently, the Chamber of Deputies would be dysfunctional if each of its 200 members came from a different political party. Some integrative force is necessary, and the Constitutional Court repeatedly stressed this in its judgements, including the present one. The Court concluded it is legitimate and constitutional to include integrative aspects in the Chamber of Deputies' electoral system.

In contrast, the aspect of differentiation is about representing as wide a range of various groups of people as possible. It is an aspect typical of proportional electoral systems, which aim to give a voice not only to the majority opinion within society but also to the minority ones.

The task to determine the balance between the two aspects is a challenging one. Especially when the desired outcomes—an effective Chamber of Deputies, stable governments, representation of minorities—are not determined solely by the electoral system. For example, Czech governments are traditionally weak and always on the verge of breaking. However, this is not due to the electoral system's lack of integrative elements but rather to the government's weak position in relation to the Chamber of Deputies. Needless to say, there is no empirical way to determine the balance between these two aspects. Therefore, when the Court rules whether the reviewed electoral system is, or is not, balanced, the reasoning is the key.

DPCE online
ISSN: 2037-6677

In the present case, the Court ruled there is no such balance, and that the integrative aspect prevailed over the differentiative one. However, the Court's reasoning in this matter suffered from a complete lack of rationale. The Court acknowledged its previous jurisprudence by adopting the above-mentioned understanding of proportionality as a balance between the two aspects; however, at the same time, the Court did not adequately analyse the results of past elections to examine whether the integrative aspect has prevailed in such a manner that the electoral system is more inclined toward a majoritarian system than a proportional one. Moreover, contrary to its argument of complexity, the Court pointed to several particular disproportions in the smallest regions of the country in order to call the electoral system disproportional and unconstitutional, not even considering the overall outcome of the various elections.

4. – As we have said earlier, the elections to the Chamber of Deputies are held in 14 electoral regions, i.e., 1) voters cast their votes choosing one party electoral list within their electoral region; 2) the seats are distributed among the electoral regions proportionally to the number of valid votes cast in each region; and 3) seats are then allocated to political parties in accordance with their gains in the particular electoral region.

Following its previous jurisprudence (Pl. ÚS 57/06), the Court ruled that the Czech Republic's division into electoral regions is not unconstitutional per se. However, the Court concluded that since the seats are allocated to political parties within the electoral regions, and those regions are greatly uneven in the number of distributed seats, the allocation of seats to political parties suffers severe disproportionality. Moreover, because some of the regions are so small that their allocated number of seats is lower than the number of political parties that have exceeded the electoral threshold, in the past some regions' natural threshold rose up to 14,8%. These grounds led the Court to conclude that the reviewed regulation of electoral regions within the reviewed electoral system violates the equality of right to vote guaranteed by Art. 18 (1) of the Constitution and, therefore, is unconstitutional (Pl. ÚS 44/17: 134). In other words, the Court held that the electoral regions are too different in size and consequently the influence of voters in the large ones (by seats) is greater than the influence of voters in the small ones. However, the Court continued, even if the electoral regions were of the same size, they still would be too small to enable the proportional allocation of seats. The Court, therefore, de facto ruled out any possibility of a constitutionally acceptable solution other than holding elections in the Czech Republic as one undivided electoral region.

Nevertheless, the Court decided, in contrast to all that it had concluded, not to repeal the reviewed regulation of the electoral regions as its unconstitutionality is dependent on the reviewed electoral system and

thus the repealing of the rest of the challenged aspects of the electoral system would remedy the unconstitutionality of the electoral regions' regulation.

It is important to state that the Court based its conclusions strictly on the petitioners' data and offered no explanation or empirical grounds as to why it considered the effect of the electoral regions as breaching the principles of proportional representation. The Court provided the example of seat allocation to political parties in the 2017 Election within the electoral region of Karlovy Vary, which was disproportional (the winning party gaining 60% of seats while gaining only 35.42% votes), but it did not prove whether, and how much, this affected the overall results of the election since only five seats were allocated within this electoral region.

To further muddy its reasoning, the Court ruled that the distribution of seats between electoral regions according to the valid votes cast was unconstitutional despite all that has been written so far. Even though the Court found such a distribution as strongly upholding the principles of proportional representation (Pl. ÚS 44/17: 138), it repealed this aspect solely because it is an integral part of the electoral system, which is as a whole unconstitutional.

The reasoning of the Court is anything but clear or convincing, and even the dissenting judges were more than concerned with the complete overturning of the previous jurisprudence constante, which considered the organic territorial division and the distribution of seats in accordance to the votes cast not only as constitutional but also as fully upholding the constitutional principles of proportional representation (Pl. ÚS 57/06: 19-23).

5. – The reviewed Parliamentary Elections Act contained an electoral threshold that political parties had to exceed to be included in the seat allocation. Single political parties had to gain at least 5% of all votes nation-wide, two-member coalitions at least 10%, three-member coalitions at least 15%, and four (or more)-member coalitions at least 20% of votes (sec. 49 of the Parliamentary Elections Act).

The Constitutional Court has, in the past, ruled all of those electoral thresholds as constitutional (Pl. ÚS 42/2000), because all of them strengthen the integrative aspect of the elections and increase the chance of stable governmental majorities, but do not cross the line between the proportional and majoritarian systems. The Court's present judgement maintained the decision concerning the 5% threshold for single political parties but repealed all the others as unconstitutional.

The 5% threshold was considered constitutional as it allows the Chamber of Deputies to fulfil its constitutional role. Another reason was that the number of "wasted" votes since 1998 (enactment of the 5% threshold) has never exceeded one-fifth of the votes (Pl. ÚS 44/17: 154).

DPCE online
ISSN: 2037-6677

The additive electoral thresholds for coalitions were deemed unconstitutional by the Court because they infringe on the principles of proportionality, i.e., the coalitions are considered as multiple subjects for the threshold, but otherwise as one. The Court gave no reason as to why it decided to diverge from its several-decades-lasting jurisprudence constante - no reason other than that the existence of the additive electoral threshold has not proven effective because it has prevented coalitions from succeeding in elections, or more precisely, because it has prevented coalitions from even being formed. Such reason is highly speculative because there has not been a coalition of political parties which has not exceeded the threshold, and we can hardly assess why some coalitions were not formed.

After the Court ruled the additive threshold unconstitutional, it departed on a very unusual journey of evaluating other possible regulation of the candidature of multiple political parties together (Pl. ÚS 44/17: 177ff). The Court thus went against its promise not to evaluate possible alternative solutions—because such considerations are the purview of the legislator and not the Constitutional Court (Pl. ÚS 44/17: 52)—and usurped the role of the legislator.

6. – In the elections to the Chamber of Deputies, seats are allocated to the political parties within one scrutinium (round of seat allocation) using the standard D'Hondt method. The method itself is neutral and fully upholds the principles of proportional representation (Pl. ÚS 57/06: 22, Pl. ÚS 44/17: 189), but when used in situations where electoral regions are of uneven size, the results might be distorted in favour of the bigger parties. In the past, the Court ruled that this distortion is not of a magnitude grounding its unconstitutionality (II. ÚS 582/06); however, in the present case, the Court has decided otherwise—again, without much of an explanation.

The Court concluded that the D'Hondt seat allocation method is not unconstitutional per se, but only in combination with unevenly-sized electoral regions. The Court referred to the petitioners' models of election results using various seat allocation methods and concluded that the D'Hondt method is problematic, particularly in the mid-sized regions where the allocation of seats is tipped in favour of the bigger parties. Furthermore, in the Court's opinion, the small regions are always in the bigger parties' hands, no matter the seat allocation method (Pl. ÚS 44/17: 190). Quite surprisingly, the Court then concluded that the D'Hondt method is unconstitutional solely because of the distortion of the results in the small electoral regions (Pl. ÚS 44/17: 191).

This inconsistent and contradictory reasoning is symptomatic of the entire ruling. It is not clear why the Court decided to repeal the D'Hondt method and not the 14 electoral regions when the regions are the grounds

for considering all other challenged aspects of the electoral system as unconstitutional. Nor did the Court explain why the mathematic formula that is neutral and fair on its own is more unconstitutional than the electoral regions which, according to the Court's opinion, on their own prevent any proportional representation whatsoever.

7. – Now that we know what the Court ruled, even if not always why, it is time to look at the broader context and possible consequences of the ruling. The present judgement is an earth-shattering one for the Czech constitutional system. Not only did it upend all the past judgements of the Court on the electoral system used in the elections to the Chamber of Deputies, but it also repealed the electoral legislation just eight months before the next election—forcing the Parliament to come up with a new one or face the unprecedented consequences of holding an election without the statutory regulation of seat allocation.

Of course, the present judgement is rooted in the Czech constitutional experience. Nonetheless, it brings to light three questions of imminent importance for comparative constitutional law and worldwide discussions on the judicial review of electoral law. It is the question of the proportionality of proportional representation electoral systems; the question of the timing of the judicial review of electoral legislation, and last but not least, the question of the institutional continuity of the constitutional system. We have touched a bit on some of these questions earlier, but shall now dedicate the rest of this article to them, as these three questions are the most important and valuable contribution of the present judgement to comparative constitutional law discussions.

8. – All the various proportional electoral systems aim to ensure the proportional representation of the different groups of the electorate. While a trivial statement this may be, it is, after all, the crucial common denominator of all proportional electoral systems and also what differentiates proportional electoral systems from majoritarian ones. The key question is, however, what counts as proportional representation? In other words, how disproportional could the representation be while the electoral system will still be a proportional one? As we have seen, this is the alpha and the omega of the present judgement.

When considering what defines the proportional electoral system, the Court listed five requirements that any electoral system has to fulfil in order to be considered proportional (Pl. ÚS 44/17: 96ff):

a collective body is elected as without the multiplicity of members of the elected subject, no proportionality is possible;

the Czech Republic might be divided into electoral constituencies but only when respecting the equality of the right to vote and the equality of access to public office;

the Chamber of Deputies is a body consisting of political parties, and voters must be allowed to choose between a plurality of them;

voters cast their votes for electoral lists;

the political party's numerical strength within the Chamber of Deputies has to be proportional to the share of votes the political party obtained.

The first and fourth requirements were not a problem; let us therefore focus on the rest.

The second requirement has been discussed already briefly within the section on the electoral regions. The Court, on the one hand, stated it was possible to divide the state for electoral purposes, but, on the other hand, ruled that this could not actually be implemented as in fact only having the Czech Republic as one electoral constituency would enable proper proportional representation. As we have said earlier, in the Court's opinion, having electoral regions of an uneven size—by the number of allocated seats—breaches the equality of the right to vote as voters in smaller regions have less opportunity to influence the overall outcome of the election than voters in bigger regions. The Court continued towards the single constituency when it concluded that even electoral regions of the same size could not be considered constitutional in the Czech Republic, as the electoral regions would be too small to enable any proportional representation and, therefore, the equality of access to public office. The Court's crucial misunderstanding of the electoral regions' size is not the misunderstanding of the consequences of the electoral constituencies of uneven size, but the cause of such unevenness. The share of allocated seats for the Czech Republic's electoral regions is proportional to the share of votes cast in the individual regions. Therefore, the voters determine their region's size by their decision to vote. The Court's objection that the electoral regions are too small is understandable, but again, the electoral regions follow the organic division of the Czech Republic into self-governing units; they were not made for the purposes of the elections. They are indeed small, but so is the Czech Republic with its 8.4 million voters.

The third requirement has been considered within the section on the electoral threshold as it is this threshold that bars political parties from being allocated any seat in the Chamber of Deputies if such party has not obtained a certain per cent of votes. As we have said before, the electoral threshold for single political parties has been ruled constitutional because it is a legitimate tool for integrating political representation while not distorting the proportionality enough to change the nature of the electoral system. On the other hand, the additive electoral threshold for coalitions of

political parties have been ruled unconstitutional by the Court. It is worth noting that the Court did not declare the additive electoral threshold unconstitutional on the grounds of breaching the principle of proportional representation nor on the grounds of "wasted votes". The Court reasoned that the regulation simply did not work because it prevented a coalition from being formed out of fear of not exceeding the threshold; this is highly speculative as we cannot know why coalitions that have never been created were not created. Another reason the Court provided was that the additive electoral threshold violates the equality of access to public office because the political parties within the coalitions are at a disadvantage compared to the single political parties. After all, coalitions are considered one subject in all electoral matters except the electoral threshold. However, the whole raison d'être for any coalition in an election is to act as one subject, be considered one subject, and make an impression of strength through unity. It is therefore only reasonable that the electoral legislation considers the coalition as one subject with the sole exception of the electoral threshold. Such an exception is self-evident—to prevent the political parties from exceeding the threshold by amassing the number of political parties under the coalition umbrella and, consequently, resulting in a political party having as low as one member in the Chamber of Deputies. The Court's implied requirement that the voter should be allowed to give the coalition as many votes as it has members is simply a bizarre one.

The fifth requirement, the share of seats proportional to the share of votes, is the key one here. Unfortunately, the Court relied upon an unspoken presumption that we all know the Chamber of Deputies election results are not proportional and that the bigger parties always gain a slightly larger per cent of seats than of the votes they obtained. The Court thus made no attempt to convince anyone with its reasoning because, supposedly, everyone is already convinced. The Court concluded that the results of the elections to the Chamber of Deputies have always been highly disproportional without providing any analysis of the results. The problem is that we do not know what the highly disproportional results are. In its previous judgements, the Court held that the proportionality of the electoral system is in its balance between the integrative aspect and the aspect of differentiation. Therefore, the electoral system cannot be considered proportional if the integrative aspect dominates. An example of such dominance could be an election in which the political party gains a majority of seats without getting even remotely the majority of votes. In other words, the proportional electoral system presupposes a coalition government on most occasions. The Court did not deal with those arguments in its present judgement—arguments that had been presented by the Court itself in the past within its jurisprudence constante. It is therefore impossible to know why the Court found the election results disproportional, since there has never been any single-party majority

government. It is true that to some small degree the electoral system helps the bigger parties, as illustrated in Table 1, however, no proportional electoral system is absolutely proportional, and the differences between the share of votes (calculated from the votes for the political parties exceeding the threshold) and the share of seats for the party with the most and the least votes are not substantial. Moreover, the question of which political parties are the bigger ones and which are the smaller ones is determined in the election by voters, not by the Parliament when enacting the electoral system. Therefore, the fact that the electoral system gives an insignificant preference to the bigger parties can hardly be understood as unconstitutional.

Table 1: Comparison of the seat allocation with the votes obtained by the parties with the most
and least per cent of votes
(the Chamber of Deputies Elections under the reviewed legislation)

Election	*Political party*	*Share of votes for parties exceeding the threshold (%)*	*Share of seats (%)*	*Difference*
2002	Czech Social Democratic Party	34.53	35.00	0.47
	Coalition of Christian and Democratic Union-Czechoslovak People's Party and Freedom Union-Democratic Union	16.32	15.50	-0.82
2006	Civic Democratic Party	37.63	40.50	2.87
	Green Party	6.69	3.00	-3.69
2010	Czech Social Democratic Party	27.21	28.00	0.79
	Public Affairs	13.40	12.00	-1.40
2013	Czech Social Democratic Party	23.40	25.00	1.60
	Christian and Democratic Union-Czechoslovak People's Party	7.76	7.00	-0.76
2017	Ano 2011	31.62	39.00	7.38
	Mayors and Independents	5.53	3.00	-2.53

Note: Data based on the Czech Statistical Office at www.volby.cz.

It is hardly possible to make a general conclusion based on one case; however, we can see some "hints" arising from this case. There seem to be three elements that ought to play a significant role during a judicial review of electoral legislation on the grounds of its proportionality—voting regulations, the seat allocation method, and the numeric strength of the political party within the elected body proportional to the share of votes obtained. Especially when considering the last two elements, we can see there is no clear distinction between what is proportional and what is not. It is not possible to say what difference between the share of votes and seats is the clear line between proportional and disproportional representation, and it is not possible to say this independently of country specifics. Given that there is no clear empirical division, the reasoning behind the ruling of a particular electoral setting as proportional or disproportional is vital. It is necessary to explain why, within the particular country's historical, political, legal (…) tradition and experience, a particular link between the share of votes and share of seats is, or is not, proportional. Unfortunately, this is precisely what the present judgement is lacking.

9. – The judicial review of electoral legislation is slightly different from the judicial review of most other legislation. The reason is straightforward. Electoral legislation regulates the elections, which are held usually every two to seven years (every four years in the Czech Chamber of Deputies). Therefore, the timing of the judgement on electoral legislation review is crucial as the consequences of repealed electoral legislation close to an upcoming election might be severe.

The present case is a shining example of how the judicial review of electoral legislation should not be conducted.

The petition for the annulment of several provisions of the Parliamentary Elections Act was filed on 13 December 2017. The Court passed the judgement on 2 February 2021—after the Chamber of Deputies election was called for 8 and 9 October 2021.

The Court explained that it had been waiting to see whether the Parliament would decide to change the electoral legislation on its own. However, as the dissenting judges pointed out, no bill was put forward in Parliament to change the Parliamentary Elections Act that had the slightest chance of success.

Another of the Court's explanations is a rather cold-blooded one. The Court stated that its ruling repealed only the provisions regulating the determination of the outcome of the elections, not the organisation thereof. The Court went even further when it concluded that although it decided to repeal the seat allocation method, it is still possible to hold the October

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ISSN: 2037-6677

election and determine its results even if the Parliament fails to pass new legislation (*Pl. ÚS 44/17: 58*). Such a conclusion is nothing less than suggesting that the judges could allocate seats to the political parties without any grounds in the legislation. In other words, the Court suggested the judiciary might replace both the Parliament and the voters even though it is the exclusive role of the Parliament to pass electoral legislation, and the voters have the right to know the "rules of the game" before voting, i.e., how they can vote and what consequences their votes have.

Moreover, although the Court considered eight months before the next elections to be non-problematic timing, the Venice Commission recommends refraining from changing electoral legislation in any way for at least one year before the next election as any such change might destabilise the system, cause a lack of trust in the legitimacy of the outcome of the election, or raise doubts about the motives of such a change (*Venice Commission, Code of Good Practice, CDL-AD(2002)023rev2-cor: sec. 2, letter b, and explanatory note No. 65).*

There are three ways to deal with a judicial review of electoral legislation when the timing is close to an election. The first possibility is to refuse to repeal the legislation on the grounds of the upcoming election. The second is to repeal the challenged provisions of the electoral legislation very delicately, with sufficient time before the next election, and with certainty that the election could be held using the "residual" legislation. Finally, the third is to repeal the challenged provisions but postpone the entering into force of the judgement until after the election. Let us now go through each of them in more detail.

The first way is represented by the U.S. Supreme Court's case *Purcell v. Gonzales* (*549 U.S. 1 (2006)*) in which the Supreme Court rejected to repeal the newly enacted obligation for voters to present photo ID during voter registration and voting, on the grounds of the upcoming election. This way of dealing with the review of electoral legislation is suitable only when the next election is imminent, as in the above-mentioned case, when the election was due in a matter of weeks. In this case, the Supreme Court decided that the predictability of the electoral process, and the voters' trust in the validity and fairness of the elections would have been at risk if it had repealed the challenged regulation.

The second possible solution is represented by the judgement No. 35 of 2017 of the Italian Constitutional Court through which the Italian Constitutional Court repealed several parts of Italian electoral legislation (*Italicum*) concerning seat allocation in the Chamber of Deputies; however, it did it more than a year before the next election and in a way ensuring that the election could be held (and the outcome determined) using the "residual" electoral legislation. As we can see, this solution presupposes there is still enough time until the next election, and the challenged

provisions are not at the core of the electoral legislation, or in other words, their repeal does not prevent the election from being held.

The third possibility is represented by the judgement of the German Federal Constitutional Court *BVefG 3 July 2008, 2 BvC 1/07* in which the German Federal Constitutional Court repealed several provisions of the German Federal Electoral Act concerning the allocation of seats, but postponed the entering into force until 30 June 2011 so that the next election in 2009 would not be affected, and the Bundestag would have enough time to pass new electoral legislation. This solution is suitable, especially when the challenged provisions are of utmost importance, constitute the core of the electoral system, and without which the election could not be held. The predictability and legitimacy of the next election are prioritised over the constitutionality of the electoral legislation. Moreover, the Parliament is given sufficient time to reach a broad consensus on the new electoral legislation and to include in the discussion as many relevant actors as possible (*BVefG, 2 BvC 1/07: 143*). This would then increase the chances that the new legislation would provide a long-term stable legal basis for future elections.

The Czech Constitutional Court did not choose any of these three possible solutions, but rather decided to repeal the substantial parts of the electoral legislation without any postponement. The Court chose to pressure the Parliament into a rather hasty enactment of the new Parliamentary Elections Act—knowing the country is in the middle of the Covid-19 crisis—without a majority government, and with a Senate controlled by a majority hostile towards the government.

10. – The last question to resolve is ahead of us—how much the Court should take into account the continuity of the institutional framework and stability of the constitutional order when reviewing electoral legislation.

Again, the present case is a perfect example of how the Court's decision on the constitutionality of the electoral legislation might have severe consequences that have been either ignored or played down by the Court. Even though the Court stated it is possible to hold the election because the ruling repealed only the regulation of the determination of its outcome, there is, in fact, no way to hold the election if the Parliament does not pass an amendment to the Parliamentary Elections Act. More accurately, the October election could be held, but there is no way to determine its results. Consequently, without the October election or a determination of its results, the current Chamber of Deputies will cease to exist on 21 October 2021 (*Art. 25 b) of the Constitution*). There will then be no way to pass new electoral legislation as any such legislation must be passed by both chambers of Parliament. It is almost rudimentary to say that without the Chamber of Deputies, the government will not be obligated to resign, and the current prime minister will hold his office for

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ISSN: 2037-6677

life. It is hard to imagine the Court did not see the possible consequences of its judgement, and therefore, it is even harder to understand why the Court gave priority to a possible vision of a more proportional representation within the Chamber of Deputies - ignoring its *jurisprudence constante* - over the stability, or we might even say the existence, of the constitutional system.

The Court's approach is in striking contrast to the one taken by the already mentioned Italian Constitutional Court, whose *jurisprudence constante* demands that after every judgement concerning electoral legislation, the renewal of all elected constitutional bodies must be possible using the "residual" electoral legislation: "In particular, the legislation remaining in force stipulates a mechanism for transforming votes into seats which enables all seats to be allocated on the basis of electoral constituencies, which remain unchanged both for the Chamber of Deputies and for the Senate. (…) It does not fall to this Court to assess whether that mechanism is advisable or effective, as its sole task is to verify the constitutionality of specific contested provisions and whether it is possible to conduct elections immediately under the residual legislation, a condition associated with the nature of electoral law as a 'constitutionally necessary law'." (*Judgement No. 1/2014: 6*).

This latest judicial review of the electoral legislation is exceptional not only because of the above-mentioned difficulty with the timing but also because it has to consider the possible legal and non-legal consequences in a much more serious manner than in the review of other types of legislation. The reason is that the outcome of an election is primarily a political one, and so is the question of choosing the electoral system and its regulatory framework. Moreover, ignoring the possible consequences might lead the constitutional system to a dead end. Unfortunately, this is what the present judgement seems to do.

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